BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF:	
FRIENDS OF JANE HARMAN and JACKI BACHARACH, as Treasurer, Respondents.	MUR 3987

BRIEF OF FRIENDS OF JANE HARMAN AND JACKI BACHARACH, AS TREASURER

Respondents Friends of Jane Harman and Jacki Bacharach, as Treasurer, submit this brief in opposition to the General Counsel's recommendation of a finding of probable cause.

I. INTRODUCTION

This matter arises from a complaint filed by Susan Brooks for Congress on June 3, 1994, alleging that Respondents violated the Federal Election Campaign Act of 1971 (the "Act") during the 1994 Congressional election.

On October 7, 1997, the General Counsel recommended that the Commission find probable cause to believe that Friends of Jane Harman violated the Act's prohibition against corporate contributions. Specifically, the General Counsel contends that by attending an October 29, 1993 fundraising event hosted by C. Michael Armstrong at Hughes Electronics Corporation, the Harman Committee accepted an unlawful corporate contribution. Once examined in the context of the entire factual record and the appropriate legal standards, however, it is clear that the General Counsel's recommendation is without merit.

In making his recommendation, the General Counsel ignores all the sworn deposition testimony in this case that the Harman Committee understood this to be an event hosted by Mr. Armstrong, Hughes' Chairman, rather than an event hosted by the corporation itself. Both Congresswoman Jane Harman and former campaign aide Judith Sitzer -- the only individuals associated with the Harman Committee who were deposed in this matter -- testified consistently and unequivocally that it was always their understanding that this event was being hosted personally, and on a voluntary basis. The record is clear that Congresswoman Harman, who considers herself a friend of Mr. Armstrong, asked him in the spring of 1993 to host a fundraising event, in his personal capacity, for the Congresswoman's campaign. The record is equally clear that both Congresswoman Harman and Ms. Sitzer believed that Mr. Armstrong was responsible for the guest list as well as the logistics of the event -- including its location. Finally, the record is clear that it was only after the filing of the instant complaint that a question was even raised as to whether this event was hosted by Mr. Armstrong or by Hughes.

Faced with the strength of Respondents' position that this fundraising event qualifies under the volunteer exemption, the General Counsel seeks to apply a legal standard incorporated in the Commission's current "corporate facilitation" regulations. Yet, even as the General Counsel seeks to hold Respondents to this legal standard, he is forced to acknowledge in a footnote that these regulations did not become effective until nearly three years after the event had occurred. Applying this legal standard nonetheless, the General Counsel then relies heavily on citations to, and quotations from, MUR 3540. Once again, the General Counsel fails to disclose that MUR 3540, like the regulations, had not been publicly

released until after the October 1993 fundraising event had taken place. The dilemma facing the General Counsel is significant because the plain text of the Act does not compel the Commission's novel interpretation that a prohibited corporate contribution is made where a corporate volunteer hosts a fundraising event using corporate resources and the corporation is later reimbursed in full by the campaign. What is left from the General Counsel's effort is little more than a desire to hold the Harman Committee accountable to a legal standard not contained in the plain text of the Act, and which had not been formulated in the FEC's published regulations when the supposed violation had been committed.

The General Counsel's analysis is all the more incomplete because of its dismissive treatment of the role that legal counsel played in the formulation and approval of this event. What the record demonstrates, and what the General Counsel omits from his brief, is the fact that each and every detail of the event at issue was reviewed by attorneys who are nationally recognized as experts in the Federal Election Campaign Act.[1] The record demonstrates that counsel were intimately familiar with, and approved of, all of the details of the event, including the written solicitations that the General Counsel's office now finds objectionable. Furthermore, and most importantly, the record demonstrates that Respondents relied fully, and in good faith, on the legal advice that was rendered by competent counsel with regard to this event.

---

[1] In fact, members of the firm that was consulted in this matter regularly and recently appeared on panel discussions with the Commission's General Counsel regarding the complex regulation of corporate political activity.

In short, the General Counsel's brief is completely inadequate to support a finding of "probable cause." It mischaracterizes and omits critical facts that demonstrate that this was not a corporate sponsored event. It ignores the shaky legal foundation upon which this entire matter is premised. Finally, it completely ignores the importance of Respondents' good faith reliance on the advice that they received from competent counsel. Each of these reasons alone is sufficient for the Commission to reject the General Counsel's recommendation. Taken as a whole, they leave no doubt that the Commission would not, and could not, prevail if it were to proceed with this matter further.

II. STATEMENT OF FACTS

Congresswoman Harman and Mr. Armstrong first met in 1992 when then-candidate Harman's office called Mr. Armstrong and said that she would like to come and see him. As Mr. Armstrong explained: "Nobody else had ever done that and so I said, sure, I was a Republican -- I am a Republican. And to have a Democratic candidate give me a call, I thought, was highly courageous." (Armstrong Depo. at 15.) During the meeting that followed, Congresswoman Harman explained her interest and positions on issues of importance to the aerospace and defense industry. Although a Republican, Armstrong found Congresswoman Harman's positions "logical" and was impressed by the meeting: "[S]he came and she presented herself and she discussed her thoughts and issues and after she left, I thought she made a lot of sense." (Id.)

Following her election to Congress in 1992, Congresswoman Harman maintained her acquaintance with Mr. Armstrong and, over the course of the next year, through regular

contacts, Congresswoman Harman became personally friendly with Mr. Armstrong. Based on this friendship, in the spring of 1993 Congresswoman Harman called Mr. Armstrong and asked him to raise money for her 1994 reelection campaign. As Congresswoman Harman stated in her sworn deposition: "[A]s part of my fund-raising effort, I identified friends who I thought could be helpful and one of those was Mike Armstrong. And I contacted him and asked him to be personally helpful and to help me raise money and he agreed to do so." (Harman Depo. at 25 (emphasis added).)

Contrary to the General Counsel report, Congresswoman Harman was clear that her request to Armstrong was personal in nature and was unconnected to any request made of Hughes or its political action committee:

> I know I made a personal request to Armstrong, and he responded to that personal request. Separate from that, I believe we made a formal request to the Hughes PAC for a contribution, and I don't recall whether I called or my fund-raising assistant called the PAC, I don't recall precisely how we did that but when I spoke to Armstrong, I told him that we were making a formal request to the PAC. That was the only contact I had of a more formal nature with Hughes.

(Harman Depo. at 30 (emphasis added).)

Sometime thereafter, Congresswoman Harman asked her campaign staffer, Judy Sitzer, to coordinate Mr. Armstrong's fundraising event with Jo-Ann Costa, Hughes' Director of Public Affairs. According to Ms. Costa, among the first things she did, even before contacting Ms. Sitzer, was to call Hughes' outside counsel on FECA issues, explain to them the circumstances of the fundraiser, and ask them "what I needed to do in terms of staying legal to have that dinner." (Costa Depo. at 47.) As Ms. Costa explained: "Knowing nothing,

I explored a lot of avenues. I asked what would be the least problematic, the best way to go, so that we stayed legal, and he [attorney Kirk Pessner] suggested that we have this, this fundraiser in an executive's home." (Id.) Ms. Costa testified that after receiving this legal guidance, she presented it to others at Hughes and was informed that the preferred venue for the event would be the corporate offices. Ms. Costa testified that she again sought legal guidance:

> I called [attorney] Kirk Pessner again and I conveyed the information and asked how to construct a legal fundraiser under those conditions [that they be in the corporate offices]. I was interested in finding out how you construct an invitation, who paid for what, what the reporting requirements were. And that was the end of that.

(Costa Depo. at 48.)

Shortly thereafter, Ms. Sitzer and Ms. Costa met at lunch to coordinate the event. According to Ms. Sitzer, at the lunch Ms. Costa told Ms. Sitzer about the advice she had received from the attorneys. According to Ms. Sitzer, Ms. Costa "had very specific guidelines from [the attorneys] and understood specifically from them what they had to do in order to comply with the federal election law. She reviewed those with me and I agreed to them. I thought that she was acting in a very, very cautious manner. So, I therefore agreed." (Sitzer Depo. at 54.) Indeed, the record demonstrates that Ms. Costa relayed to Ms. Sitzer the very specific legal advice that she had sought and received from counsel. Ms. Sitzer described it as follows:

> She sat down. She was very precise. I was actually very sort of surprised that she had everything so well thought out and organized. She said very clearly that they had consulted with their lawyers and that their lawyers had given them specific guidelines as to how this had to be handled. She said that we are not allowed to do anything corporate.

> I knew that, obviously. She said that we were going to have to pay. The food would be done by their caterer. We were going to have to pay him directly. The room cost $75 or whatever it cost. We were going to have to pay them back for that. They were going to charge us for administrative type things, like her time, which she was going to keep track of, and whatever she used, their paperclips. Literally, that is the type of thing she said to me. I thought she was being extraordinarily cautious, but I sort of figured that it was better to be safe and listen to what she said.

(Sitzer Depo. at 58-59.)

Several months passed as Congresswoman Harman and Mr. Armstrong coordinated their busy schedules to find a date for the event. Finally, all agreed, and the date was set for October 29, 1993. In early October Ms. Costa again called Ms. Sitzer to coordinate logistics for the event. In that conversation, Ms. Costa asked Ms. Sitzer for the name of the committee to whom checks should be made payable, and to whom the checks should be mailed. Ms. Sitzer provided Ms. Costa with the name of the committee -- Friends of Jane Harman -- as well as the committee's address and federal ID number. Once again, according to Ms. Costa, notes taken at that time indicate that she again spoke to her outside law firm regarding the invitation, who would be billed, and who should pay for the event. (Costa Depo. at 97.)

Several days later, on October 7, Ms. Costa again "called [the outside legal firm] and reviewed with them the structure of the event." (Costa Depo. at 105.) In addition, Ms. Costa drafted an invitation from Mike Armstrong, dated October 12, 1997, to executives of Hughes.

Although Ms. Costa "believes" that she faxed a copy of this letter to Ms. Sitzer, she stated clearly that no one from the Harman Committee made any changes to the letter.[2] Like all other aspects of this fundraising event, according to Ms. Costa, the letter from Mr. Armstrong was reviewed by outside counsel prior to dissemination on October 12. (Costa Depo. at 114.)

On October 13, 1997, Hughes PAC -- Hughes Active Citizenship Committee -- sent its own solicitation letter for the Harman event. This letter, which was addressed only to the most senior executives of Hughes, was drafted by Ms. Costa and signed by Ted G. Westerman, Senior Vice President of Human Resource Administration, and William D. Merritt, Vice President for Federal Government Relations. Ms. Costa neither recalls sending a copy of this letter to the Harman Committee *nor discussing it with anyone associated with* the Harman Committee. Like the letter from Mr. Armstrong, Ms. Sitzer specifically denies having seen a copy of the letter prior to its dissemination. Also like the prior letter from Mr. Armstrong, Ms. Costa specifically recalls reviewing this letter with counsel prior to *sending it*:

> I specifically called legal counsel and asked them. I read this letter to them. I told them about the letter [sic] foot, who signed it, the forwarding of checks, everything, the suggested contributions, the whole bit, and cleared it with outside legal counsel on the phone. I read them both letters. I was more concerned with this one. This one, to me, I had sufficient information to write. This one was a new ball game in my mind and I needed to clear it with legal counsel.

---

[2] Ms. Sitzer was more direct in stating that she did not see a copy of the invitation letter from Mr. Armstrong to Hughes executives.

(Costa Depo. at 123.)

On October 29, 1993, the fundraiser was held as scheduled. The fundraiser, which yielded approximately $20,000, was attended by Mr. Armstrong as well as other individuals associated with Hughes. All the individuals who gave testimony in this matter agreed, under oath, that Mr. Armstrong and others at Hughes decided the guest list and the logistics of the event without input or prior review by the Harman Committee. The Harman Committee had no input in the type of room for the event, where the microphone or lectern would be placed in the room, how much executives at Hughes would be asked to contribute, or who at Hughes would be invited to attend. In fact, at the time of her deposition, Ms. Sitzer did not even know whether individuals other than Hughes employees were invited to or attended the event. Ms. Sitzer stated: "I have no idea who those people were. I don't know if they all worked for Hughes or if some of them did. I don't know everybody that works there, so I would have no way of knowing that." (Sitzer Depo. at 80.)

When asked whether they considered this to be a Hughes fundraising event or a Mike Armstrong fundraising event, both Ms. Sitzer and Congresswoman Harman stated unequivocally that they considered it to be a personal, private fundraising event of Mr. Armstrong. Despite goading from the General Counsel's office, in her deposition Ms. Costa refused to dispute this account: "I had sought outside legal counsel to make sure that it fell within all of the legal parameters and structured it accordingly. I hadn't called it anything or hadn't thought of it as anything." (Costa Depo. at 127.)

Following the event, Hughes sent the Harman Committee a bill for all of the costs associated with the event. This included a $50 charge for the use of the room and $950 for food and beverages. Hughes also billed the Harman Committee for staff labor, identification badges, and stationery. In addition, Ms. Costa billed the Harman Committee $50 for "other administrative" expenses. When asked to identify these other expenses, Ms. Costa stated "I was concerned that I missed something, so I charged them $50 in case I did. If there was something that I had forgotten, I attempted to cover it with the $50." (Costa Depo. at 159.) Ultimately, Ms. Costa sent the Harman Committee an invoice asking for two checks, one made payable to Hughes Aircraft Company for $857.46, and the second made payable directly to Canteen Corporation for the food and beverage services in the amount of $950. Both of these invoices were paid in full by the Harman Committee.

III. ARGUMENT

A. The Fundraising Event Falls Within the Individual Volunteer Activity Exemption

Commission regulations provide that stockholders and employees of a corporation may make "occasional, isolated, or incidental use of the facilities of a corporation for individual volunteer activity in connection with a federal election." 11 C.F.R. § 114.9(a)(1). Furthermore, Commission regulations provide that a stockholder or employee may make more than occasional, isolated, or incidental use of a corporation's facilities for individual volunteer activities so long as they reimburse the corporation within a "commercially reasonable time" for the use of the facilities. Id. at § 114.9(a)(2). Thus, under § 114.9, a corporation's employees may use corporate facilities for individual volunteer activity in connection with a

federal election, even if that use is more than occasional, isolated, or incidental, so long as the corporation is reimbursed within a commercially reasonable time for the costs associated with the use of the corporate facilities.

It is precisely this type of volunteer activities that took place in this case. Congresswoman Harman stated that she first contacted Mr. Armstrong as a friend whom she thought could be "personally helpful" in raising funds for her campaign. (Harman Depo. at 25.) Elsewhere in her deposition, she stated clearly that she "contacted [Mr Armstrong] in his personal capacity as someone that I knew well who had supported me personally in the past and asked him to help me in a very tough election and to do that by reaching for friends and acquaintances who could, along with him, write individual checks to me." (Id. at 38.) Similarly, Ms. Sitzer, who organized the event for Congresswoman Harman, stated unequivocally that she believed that the October fundraiser was a private "Mike Armstrong" fundraiser, rather than a fundraiser sponsored by Hughes. (Sitzer Depo. at 89-90.)

In apparent anticipation of this argument, the General Counsel makes a half-hearted effort to argue that the record is ambiguous as to whether Congresswoman Harman and Ms. Sitzer believed that this was an Armstrong event or a Hughes event. Specifically, the General Counsel points to portions of the sworn deposition transcripts where Congresswoman Harman and Ms. Sitzer refer to the fact that "Hughes" had sought legal advice regarding the fundraiser. A careful review of the record, however, demonstrates that the General Counsel's argument is without merit.

Although this was clearly an event hosted by Mike Armstrong, it nonetheless took place on corporate premises. It is not surprising then that Hughes' counsel would review the facts and circumstances of the event precisely for the purpose of ensuring that it remained an Armstrong rather than a Hughes sponsored event -- and that no impermissible corporate expenditures were made. Thus, when Congresswoman Harman and Ms. Sitzer refer to the fact that Hughes consulted with counsel to ensure its compliance with all campaign finance laws, that is a correct and proper statement that does not alter, in any way, the character of the event. Congresswoman Harman summed up her understanding, and the understanding of the Harman Committee, as follows:

> It was -- in my mind it was Mike Armstrong's fundraiser. If he said it at Hughes, at the election of Hughes, I assumed it was for his convenience or the convenience of some folks, but my understanding was that he was reaching for acquaintances to raise money and my understanding further was that every single thing done at that event complied with the federal law.

(Harman Depo. at 39.)

In light of this uncontradicted testimony, there is simply no basis for the Commission to proceed with a finding of probable cause. As an employee of Hughes, Mr. Armstrong was entitled to undertake volunteer activity on behalf of the Harman campaign. So long as the corporation was reimbursed within a commercially reasonable time, Mr. Armstrong could utilize corporate facilities, including the dining room in which the event was held, letterhead and stationery, and telephone and facsimile services.

The General Counsel also places heavy reliance on the fact that Hughes' PAC sent a second fundraising appeal on October 13, 1993, asking senior Hughes executives to

contribute specific amounts -- on a fully voluntary basis -- to the Harman campaign. What the General Counsel ignores is the fact that the Commission's own regulations provide that corporations and their PACs may disseminate partisan communications as long as the text of those communications is their own and does not reflect materials prepared by the candidate. 11 C.F.R. § 114.3(a). So long as those communications do not originate from the candidate, no restriction applies as to their content. In fact, § 114.3(c)(2) allows corporations to assume the expense of communications with the restricted class, including appearances by a candidate to appeal for contributions. Thus, a compelling argument could be made in this case that Hughes could have solicited, on an unreimbursed basis, its very senior executive personnel to contribute to the Harman campaign. Certainly, there is no prohibition in the Act on Hughes' PAC making such a solicitation or in having the Harman Committee reimburse the corporation or the PAC for the cost of that solicitation. Therefore, the General Counsel does not make clear why he believes that a perfectly lawful communication by the Hughes PAC in any way reflects an improper taint on Mr. Armstrong's fundraising event.

In any event, the record clearly demonstrates that no one at the Harman campaign, including the candidate herself or Ms. Sitzer, saw Hughes' PAC solicitation prior to the administrative complaint being filed in this matter. Having never seen that solicitation, there was no reason for the Harman Committee to believe that this event had somehow "transformed" itself from an Armstrong event to a Hughes corporate sponsored event.

Faced with the clear application of the volunteer activities exemption to the facts of this case, the General Counsel seeks to invoke precedent and regulations that did not exist at

the time of the 1993 fundraising event. Thus, after acknowledging that corporations may make partisan communications with their executive personnel on any subject and acknowledging that a corporation's employees may conduct individual volunteer activity, the General Counsel seeks to limit these clear provisions by citation to an enforcement action and to regulations that were not in effect until after the fundraising event had concluded. Specifically, the Commission seeks to hold the Harman Committee accountable under a standard it acknowledges was first articulated in Matter Under Review 3540. Thus, the Commission seeks to limit the individual volunteer activity exemption by citing MUR 3540 for the following proposition:

> The 'individual volunteer activity' exemption does not, however, extend to collective enterprises where the top executives of a corporation direct their subordinates in fundraising projects, use the resources of the corporation, such as lists of vendors and customers or solicit whole classes of corporate executives and employees and collect and forward the contributions to recipient committees.

(General Counsel's Br. at 2.) Although the General Counsel is forthcoming in acknowledging that the Commission's corporate facilitation regulations were not promulgated until 1995 and did not become effective until 1996, he is significantly less forthcoming in his reliance on MUR 3540. The fact is that the General Counsel's report in 3540 was not filed until February 24, 1994, and did not become public until after the conciliation agreement was signed ten months later, in December 1994. There is simply no basis for holding the Harman Committee responsible for understanding a complex legal regime that the Commission's own citations acknowledge did not exist publicly until more than a year after the fundraising event in question had concluded.

The only other legal citations contained in the General Counsel's brief are equally inapplicable to the situation faced by the Harman Committee in the fall of 1993. For example, in support of its statement that "a corporation may not, however, step beyond the line of communication to actually collecting contribution checks or otherwise facilitating the making of contributions to federal candidates," the Commission cites four advisory opinions in addition to MUR 3540. As an initial matter, the existence of an advisory opinion -- even one that directly addresses the facts and circumstances presented by the Harman Committee -- would not legally bind the Harman Committee to any particular course of action unless it had been the requester of the opinion, and the facts addressed by those opinions were not materially different in any way from those involved in this matter..

Even if these advisory opinions could be viewed as somehow "binding" on the Harman Committee, none of the four opinions cited by the General Counsel's office would have provided any indication to the Harman Committee that the activities it was undertaking were somehow inappropriate or improper. For example, the first of these opinions, Advisory Opinion 1982-2, addressed the question of whether the National Radio Broadcasters Association could send letters to its active and associate members recommending that they support specific candidates for federal office and encouraging them to vote for those candidates. In response, the Commission wrote that "NRBA may do so because the proposed activities fall within the permissive provisions of Part 114 of the Commission's regulations and because the NRBA is an organization which may properly avail itself of those provisions." In other words, the Commission held that the corporation could pay certain expenses associated

with supporting individual federal candidates so long as its activities were targeted at its solicitable class.

The next advisory opinion, 1982-29, would have been equally unenlightening for the Harman Committee in the summer and fall of 1993. In that advisory opinion, United Telecom Political Action Committee asked whether it could offer payroll deduction as an option to the subsidiaries of United Telecommunications, Inc. and whether the Act supersedes state law as to this question. In response, the Commission wrote that it "answers both questions in the affirmative." There is nothing in this advisory opinion that would have led the Harman Committee to conclude that Mr. Armstrong's volunteer activities were somehow unlawful.

The next advisory opinion, 1986-4, is also inapposite. In that advisory opinion, Armstrong World Industries sought advice as to whether it, without a separate, segregated fund, could organize and control a widespread effort to have Armstrong employees make contributions to federal candidates. Explaining that this activity could only be done lawfully through a separate, segregated fund, the Commission specifically noted that Armstrong's proposal was not "a spontaneous activity of individual employees" covered by 11 C.F.R. § 114.9. As the record demonstrates, and indeed as the General Counsel's office concedes, there was no such "widespread" effort at Hughes to have direct corporate involvement in the fundraising process. In fact, as the General Counsel's office points out in its brief, the fundraiser in question is the only fundraising event ever held on Hughes' corporate premises. Furthermore, the record is devoid of any widespread organized effort at Hughes to organize its employees' political activities. Rather, this event in question resulted from a personal

contact by Congresswoman Harman with CEO Mike Armstrong. The record demonstrates that what occurred in this instance was precisely the type of "spontaneous activity of individual employees" that the Commission acknowledged in 1986-4 as protected.

Finally, and perhaps most puzzling, the General Counsel cites Advisory Opinion 1987-29. In this opinion, the National Association of Life Underwriters and the Life Underwriters Political Action Committee asked the Commission whether the corporate association could finance the communications endorsing and soliciting contributions for specific federal candidates and whether the PAC could accept and transmit the solicited earmarked contributions without affecting the PACs contribution limits. In response, the Commission noted at "its meeting on February 25, 1988, the Commission considered and voted on alternative proposed opinions in response to the original request, but did not approve an advisory opinion by the required affirmative vote of four members." In other words, the Commission deadlocked as to whether this was appropriate or inappropriate "corporate facilitation." The Commission then went on to approve a less ambitious, alternative proposal. Again, nothing in this opinion has any bearing, nor provides any meaningful guidance, on the fundraising event held at Hughes on October 29, 1993.

In short, the General Counsel has asked the Commission to find probable cause that the Harman Committee violated a legal standard that was not codified in the Act, was not promulgated in the regulation, and was not even found in MUR 3540 until 10 months after the event occurred. With all due respect, the General Counsel's recommendation is simply insupportable. The General Counsel's position is made all the more insupportable by the fact

that the corporate facilitation regulations ultimately promulgated by the Commission in 1995 do not flow logically or inevitably from the organic text of the Act. Section 441b outlaws the making of a contribution or expenditure by a corporation in connection with any election. It was the Commission, and not the Act, that decided that in an instance such as this where a candidate promptly reimburses a corporation for the expenses associated with an event held on its premises, a "contribution" has been made. Such an interpretation of the term "contribution" defies the common meaning of the term and thus could hardly be said to have been self-evident to the Harman Committee at the time the event was held.[3]

In sum, the General Counsel's office asks the Commission to adopt an untenable theory on facts unfavorable to its positions -- ultimately leading to a federal court evaluation of the merits of the Commission's position in this case and indeed the validity of the legal underpinnings to the Commission's theory of corporate facilitation. Respondents suggest that, in light of the unique factual circumstances of this case, including the timing of the event as well as the prominent role counsel played in approving the details of the event, the Commission not take such a momentous step forward. Instead, Respondents suggest that the correct and equitable action to take would be for the Commission to reject the

---

[3] Nor is it self-evident that in calculating the amount of the "contribution," one should include the amount of money raised in connection with the event in the total. Rather, common sense would appear to dictate that the amount of the "contribution," if any, would be limited to the amount of money "advanced" by, and later reimbursed to, the corporation. In this instance, of course, that would lead to a "contribution" by Hughes of less than $1,000.

recommendation of the General Counsel in favor of those cases where the facts are more favorable to the Commission's position and the law more settled.

B. *Respondents Relied in Good Faith on the Advice of Counsel*

It is well-settled that "reliance on the advice of counsel is recognized as a valid defense in both civil and criminal contexts." Rea v. Wichita Mortgage Corp., 747 F.2d 567, 576 (10th Cir. 1984); SEC v. Savoy Industries, Inc., 665 F.2d 1310, 1314 n. 28 (D.C. Cir. 1981). In order to sustain a defense, one must establish: (1) that she made a complete disclosure to counsel; (2) that she requested counsel's advice as to the legality of the contemplated action; (3) that she received advice that the action was legal; and (4) that she relied in good faith on that advice. See also SEC v. Goldfield Deep Mines Co., 758 F.2d 459, 467 (9th Cir. 1985).

While there are no reported cases applying this defense to civil liability under the FECA, numerous courts have relied on the defense to find for defendants under statutes similar to section 441b(a). For example, courts have embraced the advice-of-counsel defense in the context of federal regulation of union elections. J.J. Newberry Co. v. NLRB, 645 F. 2d 148 (1981). In Newberry, an employer sought their attorneys' advice as to whether to implement a planned pay raise while they contested a union election petition before a National Labor Relations Board regional director. Id. at 151. Relying on advice on counsel, they chose to withhold the pay raise until the regional director had ruled on the petition. Id. The union then filed charges with the NLRB contending, among other things, that the withholding of the pay raise was an unfair labor practice. Id. at 151-52. An administrative law judge found for the employer on the issue of withholding the pay raise, citing their reliance on

advice of counsel. Id. at 152. The Second Circuit upheld the judge's finding, again citing the employer's advice of counsel defense. Id. at 152-53.

Courts have similarly accepted the advice-of-counsel defense in federal securities law cases. SEC v. Steadman, 967 F. 2d 636 (D.C. Cir. 1992). In Steadman, an investment adviser who had previously sold shares in an array of states decided instead to sell shares by mail order from the District of Columbia. Id. at 639. Relying on the advice of the attorney, the adviser let state securities registrations lapse, provoking an investigation by the Securities and Exchange Commission. Id. The D.C. Circuit not only cited the defendants' advice of counsel defense in rejecting a district court finding of securities fraud, but also cited reliance on advice of counsel as a factor in rejecting for injunctive belief. Id. at 642. 647-48.

In light of this established law, and the undisputed fact that the Harman Committee agreed in good faith and reasonably to rely on the expert legal advice, it is quite striking that the General Counsel failed to address this point more directly in his brief. Indeed, the General Counsel appears to have avoided any prolonged discussion of these facts and his brief is completely silent with respect to the law. Nonetheless, an examination of the undisputed facts of this case and the applicable law demonstrates that Respondents' conduct satisfies all of the requirements for a valid advice of counsel defense.

With respect to the first two requirements -- that Respondents made complete disclosure to counsel and sought counsel's advice as to the legality of the contemplated action -- the record is clear. In fact, the record reveals at least four separate conversations in which Ms. Costa sought legal advice regarding the planning of the event. Indeed, Ms. Costa recalls

discussing this matter with attorney Kirk Pessner, conveying all of the relevant information to him, and asking him "how to construct a legal fundraiser." (Costa Depo. at 48.) Ms. Costa stated that she conveyed to Mr. Pessner in that telephone conversation her interest "in finding out how you construct an invitation, who paid for what, what the reporting requirements were." (Id.)

On a subsequent occasion, Ms. Costa recalls reviewing with legal counsel the fundraising solicitation letters that were sent. In the course of that conversation, she recalls asking about the propriety of who signed the letter, how the checks should be forwarded, and whether the solicitation could mention a suggested contribution amount. (Costa Depo. at 123.) In sum, the record is clear that through Ms. Costa, and indeed at her insistence, the Harman Committee relied upon the advice of qualified, expert attorneys in order to ensure compliance with the Act.

Similarly, the record demonstrates that Respondents received highly specific advice from the attorneys on how to comply with the Act. Ms. Sitzer testified that Ms. Costa assured her that "she had spoken to the Hughes attorneys and that she had very specific guidelines from them and understood specifically from them what they had to do in order to comply with the federal election law. She reviewed those with me and I agreed to them." (Sitzer Depo. at 54.) According to Ms. Sitzer, the legal advice covered every aspect of the event. The advice she received via Ms. Costa included how the food would be provided and paid for, the cost and reimbursement method for the room, and the tracking and reimbursement of administrative expenses. (Sitzer Depo. at 58-59.) As noted above,

Ms. Costa testified that the legal guidance also included the approval of the solicitation letters, how they were signed, and how contributions could be forwarded to the campaign. (Costa Depo. at 123.)

Finally, and most important, the record demonstrates that Respondents relied on the attorneys' advice in good faith. Ms. Sitzer said she agreed to follow the advice given by attorneys, thinking that "it was better to be safe" by adhering to legal advice that she found "extraordinarily cautious." (Id. at 54, 59.) Ms. Costa described Respondents' good faith, and the dilemma in which they had been placed by the advice they received:

> I had acted in good faith. I had been given bad advice by the attorney and there was nothing I could do about it . . . [W]e did everything we are supposed to do . . . we followed what we are supposed to do.

(Costa Depo. at 146.) The record shows that if the attorneys' advice had been different, the Respondents would have acted in a different manner. Ms. Costa said that if she had thought that the legal advice she received was incorrect, she "would have done something different [sic]." (Id.)

In sum, the record offers no evidence at all of bad faith on the part of Respondents. Indeed, the record amply demonstrates their good faith reliance on the advice of outside counsel and their sincere efforts to remain in compliance with the Act. Most striking about all of the deposition testimony in this case is the earnest effort made by all of the participants to seek and follow competent legal advice in the planning and execution of this event. In his deposition, Mr. Armstrong noted that while at IBM, he had been involved in a fundraising dinner for President George Bush that had similarly drawn attention from the FEC. As a result of that experience, Mr. Armstrong testified that, when approached about this event, he

told his staff: "Do it right and be sure to get counsel in doing it because these things have more little nuances to them." (Armstrong Depo. at 23.) Congresswoman Harman echoed those sentiments when she stated that she had been told that someone had "carefully checked with counsel about all of the details of the event." (Harman Depo. at 40.) That the advice received by the participants in this event may ultimately have been proven incorrect or inconsistent with the Commission's position on "corporate facilitation" is irrelevant. The fact is that the record in this matter reveals that the Harman campaign relied in good faith on the advice received from competent counsel. As a result, on this basis, the Commission should not find that there is probable cause to believe that Respondents violated the Act.

IV. CONCLUSION

For the foregoing reasons, the Commission should reject the General Counsel's recommendation to find probable cause and should dismiss the matter expeditiously.

Respectfully submitted,

Robert F. Bauer
Marc E. Elias
PERKINS COIE
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011
(202) 628-6600

Attorneys for Respondents

Dated: November 21, 1997